TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Argument Against Granting Certiorari	3
Conclusion	5
Certificate of Service	6

TABLE OF CITATIONS

Cases

Beck v. Washington, 369 U.S. 541 (1962)	4
Cardinale v. Louisiana, 394 U.S. 437 (1969)	3
Clarendon House v. Helfert, 213 Va. 28 (1972)	4
Hill v. California, 401 U.S. 797 (1971)	3
Manley v. Commonwealth, 211 Va. 146 (1970)	4
Rice v. Commonwealth, 212 Va. 778 (1972)	4
Rugendorf v. United States, 376 U.S. 528 (1964)	4

Other Authorities

28 U.S.C. § 1257 (3)	1, 5
Virginia Code Section 8-289.1 of the 1950 Code of Virginia, as amended	4, 5
Rule 5:7, Rules of the Supreme Court of Virginia	4
Rule 19, Rules of the Supreme Court of the United States	5

Supreme Court of the United States

October Term, 1972

No. 72-713

JESSE BACON SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Error is set forth in the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

STATEMENT OF THE CASE

On the day prior to Petitioner's trial, the trial court ruled that a psychiatrist subpoenaed by Petitioner was an unnecessary witness. The exact nature and basis of the trial

court's ruling is unclear as there is no record of the hearing nor was any order entered specifying the reasons for the action.

At the trial Petitioner took exception to the trial court's ruling regarding the witness upon the generalized ground that such action would abridge the petitioner's constitutional rights. Transcript pages 5-6.

At the conclusion of trial Petitioner made the following assignments of error:

> 1. That the Court erred in not ruling that Dr. Fathy A. Abdou did not have to testify after having been duly subpoenaed by the defendant, privilege not being claimed.
>
> 2. That the Commonwealth used inflammatory remarks to the jury.
>
> 3. That the defendant was denied a preliminary hearing.
>
> 4. That the verdict of the jury and the judgment of the Court was contrary to the law and evidence.

The above assignments of error were presented to the Supreme Court of Virginia in a Petition for Writ of Error. The argument which was submitted to the Virginia Supreme Court in relation to assignment of error No. 1 above is set forth in its entirety below:

> I. Based On The Law And Evidence The Court Erred In Ruling That Dr. Fathy Abdou Did Not Have To Testify When He Had Been Lawfully And Regularly Subpoenaed Within The Rules Of Court.
>
> Virginia Code Section 8-289.1 of the 1950 Code of Virginia, as Amended, codifies the law generally accepted in a majority of jurisdictions that a physician or psychiatrist cannot be excused on the grounds of privilege when in fact privilege is not claimed by either the

physician, psychiatrist or patient. Further that a physician or psychiatrist should not be excused, irrespective of the claim of privilege, when the patient's competency and ability to testify is in direct dispute and is an issue in a legal proceeding. See *Portsmouth* v. *Cilumbrello,* 204 Va. 11, 129 S.E.2d 31, *Petition of Trinidad Corporation,* 238 Fed. Sup. 928 (e.d. Va. 1965). Therefore, under the law it clearly appears that not only the mental but the physical condition of Stuart D. Hall, the complaining witness at this trial, was in issue and the Court erred in quashing the subpoena of Dr. Fathy Abdou.

The issue being raised by Petitioner that neither the petitioner nor his counsel was at the hearing at which the trial court ruled that the psychiatrist was an unnecessary witness was not raised at trial nor assigned as error in the Supreme Court of Virginia, and is being raised in this Court for the first time. See Petition for Writ of Certiorari page 5.

ARGUMENT AGAINST GRANTING CERTIORARI

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra,* and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California,* 401 U.S. 797

(1971). To same effect see *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

When a comparison is made of the issues raised in the Supreme Court of Virginia with those being raised in this Court, it becomes apparent that Petitioner is raising issues for the first time in this Court. The issue that due process was denied when neither petitioner nor his counsel was present at a hearing when a subpoena issued on behalf of the petitioner was quashed has never been raised in the Virginia courts. A review of the errors assigned and argument presented to the Virginia Supreme Court clearly reveal that at no time was the Virginia Supreme Court called upon to determine the constitutionality of § 8-289.1 of the Code of Virginia, which provides for a physician-patient privilege.

The Virginia Supreme Court has consistently held that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:7, Rules of the Supreme Court of Virginia; *Clarendon House* v. *Helfert*, 213 Va. 28 (1972); *Rice* v. *Commonwealth*, 212 Va. 778 (1972); *Manley* v. *Commonwealth*, 211 Va. 146 (1970).

In *Beck* v. *Washington*, 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon this issue this court said, "[t]his point is not properly before this Court. Although both opinions of the Washington Supreme Court discuss the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute." 369 U.S. at 549, 550.

Clearly, the ground of objection to the trial court's action in quashing the subpoena was not stated with reasonable certainty as required by the Virginia Supreme Court rules, nor was any argument made to the Virginia Supreme Court that the trial court's action amounted to the State, under the guise of the physician-patient privilege, suppressing evidence which might be favorable to the petitioner. See Petition for Writ of Certiorari, page 5.

The Commonwealth submits that the Virginia Supreme Court has not been given an opportunity to provide a definitive interpretation of § 8-289.1, Code of Virginia, and that the jurisdiction of this Court cannot rest upon 28 U.S.C. § 1257 (3) since the validity of a State Statute has never been drawn in question on the ground of its being repugnant to the Constitution or laws of the United States. See also Rule 19, Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons the Commonwealth of Virginia submits that there is no adequate record before this Court upon which to decide the issues raised, and that this Court should not exercise jurisdiction over issues of such magnitude when the Virginia Courts have not passed upon them. Therefore, the Petition for Writ of Certiorari should be denied.

ANDREW P. MILLER
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and I have mailed three (3) copies of this Brief in Opposition to Calvin H. Childress, 807 Plaza One Building, Norfolk, Virginia 23510, counsel for Petitioner, on or before February 5, 1973.

JAMES E. KULP
Assistant Attorney General